Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1477

FAST MOTOR SERVICE, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION

and

ALL-AMERICAN, INC.,
CW TRANSPORT, INC.,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

MOTION TO AFFIRM.

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Appellees, All-American, Inc. and CW Transport, Inc. move, pursuant to Supreme Court Rule 16, to affirm the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered March 25, 1975, for the reason that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED.

It is respectfully submitted that the only questions presented here are:

1. Did the Interstate Commerce Commission properly act within its statutory authority in denying the application of Appellant, which is the subject matter of this appeal?

2. Is the decision of the Interstate Commerce Commission as affirmed by the Court below, supported by substantial evidence of record?

3. Was the action of the Commission in denying Appellant's application arbitrary or capricious?

STATEMENT OF THE CASE.

Appellant sought authority from the Interstate Commerce Commission as a contract carrier by motor vehicle in the transportation of specified commodities between points in 23 named states under a continuing contract with Continental Can Co., Inc. The application was assigned for hearing before an Administrative Law Judge for issuance of a report and recommended Order thereon. The application was opposed by various motor common carriers, including Appellees herein, and by Order served July 14, 1972, the Administrative Law Judge denied Appellant's application in its entirety upon finding that the authority sought would not be consistent with the public interest and the National Transportation Policy. This recommendation was ultimately affirmed by Division 1 of the Interstate Commerce Commission acting as an Appellate Division by Order served March 26, 1973.

Thereafter Appellant filed its complaint in the United States District Court for the Northern District of Illinois, Eastern Division, seeking judicial review of the administrative agency's decision and on March 25, 1975, that Court entered its decision sustaining the earlier rulings of the Interstate Commerce Commission.

Appellant has filed its Notice of Appeal of that decision with this Honorable Court and because these Appellees feel that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument, this Motion to Affirm is respectfully submitted.

ARGUMENT.

The Appellant herein is looking to this Honorable Court to substitute its judgment for that of the Commission's even though the decision rendered by the administrative agency has support in the record and the applicable law. Such relief would be contrary to the enunciations of this Honorable Court in *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 536 (1946).

Appellant would have this Honorable Court believe that the decision of the administrative agency and the sustaining of that Order by the Court below erodes the principles set forth by this Honorable Court in the landmark decision of *Interstate Commerce Commission* v. *J-T Transport Company, Inc. et al.*, 368 U. S. 81 (1961), and that instead of relying upon the guidelines set forth by this Court in that decision, the administrative agency imposed upon Appellant herein a burden of proof not required of similar applicants seeking authority from it. The Court below found such argument to be unsupported in the record, and it is respectfully submitted that an affirmation of that decision by the Court below is here warranted.

In the *J-T Transport Company* case, this Honorable Court held in essence that in a contract carrier proceeding the distinct need of shippers for new contract carrier service, as a criterion for the granting or denial of a contract carriage permit, must be weighed against the adequacy of existing service; that there is no presumption that the services of existing carriers will be adversely affected by a loss of potential traffic, if they have not handled it before; that the applicant does not have the burden of proving the inadequacy of existing services; that the adequacy of existing service is judged by whether existing carriers can fill the distinct needs of the shippers and not merely by whether they can provide reasonably adequate service; and that rates are a factor to be weighed in determining the need for new service. That such

guidelines remain the law today concerning contract carriage is so well accepted as to not require further argument, but it must be kept in mind that in fact, the administrative agency rendered its decision consistent with these guidelines in every respect.

Appellant's entire jurisdictional statement rests upon its argument that the administrative agency applied a different standard or burden of proof to this Appellant than it does to other applicants before it. The administrative agency simply found that Appellant's presentation before it was so vague and indefinite so as to preclude the Commission from making a rational determination as to what in fact the transportation needs of Continental Can were, and as a consequence thereof, leaving the Commission unable to make an effective comparison of the services proposed by applicant with that available from existing carriers. As this Honorable Court noted in the *J-T Transport Company, supra*, at page 90, it is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need and when and if that is accomplished, those opposing the application have the burden of going forward to show that they have the ability and willingness to meet that specialized need. If those opposing carry that burden, the burden of proof reverts to the applicant to demonstrate somehow that it is better equipped to meet the distinct needs of the shipper than are those opposing its application.

Appellant would have this Honorable Court believe that it appeared before the administrative agency not knowing the burden of proof it was required to present to establish a prima facie case. This representation is made even though the administrative agency in *John Novak Contract Carrier Application*, 103 M. C. C. 555, 557 (1967), articulated clearly the type of evidence it expected of any applicant seeking authority from it. This includes an identification of the commodities shipped or received, the points to or from which the traffic moves, the volume of freight they would tender to applicant, the transportation services now used for moving the traffic and any deficiencies

in existing services. Throughout the proceedings before the administrative agency as well as the Court below, the Appellant herein readily acknowledged that its presentation before the agency was, to say the least, imprecise in nature, but took the position that the Commission in other proceedings had accepted such evidence in support of applications. As a consequence Appellant argued, one standard of proof was applied to this Appellant while another less stringent burden upon other applicants before the administrative agency. Appellant relied heavily in the Court below in this regard on the Commission's decision in *Mobile Home Express Limited, Extension—12 States,* 112 M. C. C. 765 (1971). Appellant noted that the Commission concluded therein at page 770, that an applicant is not required to present evidence of the precise volume of traffic which it would tender to it and that imprecision concerning origins and destinations of the involved traffic will not operate as a total bar to a grant of the authority sought. Appellant failed to apprise itself of the fact that the Commission also determined, however, that such imprecision does affect the weight to be accorded such indefinite evidence when related on balance to that offered by protestants in determining whether a grant of authority is justified. In fact, it was this imprecision in the evidence presented which led the Commission to deny the authority sought in the *Mobile Home* case and such decision was affirmed on appeal in *Mobile Home Express Limited* v. *U. S., et al.,* 354 Fed. Supp. 701 (D. C. Oklahoma, 1973).

The administrative agency and the Court below have determined that viewing the record as a whole, Appellant has failed to sustain its burden of proof in this proceeding; the same burden of proof required of any applicant seeking authority from the Interstate Commerce Commission.

CONCLUSION.

Appellant here looks to this Honorable Court to substitute its judgment for that of the administrative agency based upon the evidence of record in this proceeding. It suggests that the administrative agency applied one standard of proof to its application requiring evidence of greater substance than that required of other applicants seeking similar authority. The fact remains that the vague and indefinite presentation made by Appellant before the administrative agency effectively precluded it from reaching any decision other than the one which is the subject matter of this appeal. In point of fact, the Appellant is here seeking that very relief; that is, it seeks to advance the position that the broader the authority sought the lesser the burden of proof necessary to justify a grant of authority. As the Administrative Law Judge correctly noted, "the burden of proof on those seeking the authority is not lessened because the application involves numerous facilities in a major portion of the United States. They must establish the essential elements of a need for service in all of the territory where authority is sought." (Jurisdictional Statement, p. 30a).

The questions presented here have long ago been decided by this Honorable Court, and Appellant has raised no issues or facts of any substance sufficient to warrant further argument. Accordingly, it is respectfully urged that this Motion to Affirm be granted.

Respectfully submitted,

DAVID AXELROD,
CARL L. STEINER,
Attorneys for Appellees, All-American, Inc. CW Transport, Inc.